

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLORIA GARNICA

Claimant

VS.

DILLON COMPANIES, INC.

Respondent

Self-Insured

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Docket No. 255,807

ORDER

Claimant appeals from a preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge denied benefits based on his finding that claimant's injury did not arise out of her employment. Whether an injury arose out of employment is a jurisdictional issue pursuant to K.S.A. 44-534a and that is the sole issue to be considered at this time.

Claimant has separately moved to recuse the Administrative Law Judge from this case, claiming bias and prejudice. Claimant has raised the same issue in numerous cases, and the Board will address this issue for this and other cases by a separate order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Order should be reversed and benefits granted.

The essential facts are not in dispute. Claimant worked part time for respondent in the salad bar area of the produce department. At the time of her injury, she had worked for respondent approximately a year and a half.

On May 2, 2000, claimant slipped and fell outside the door to a conference room. She was on break and had gone to get hair dye left for her in the conference room by a coworker. Claimant had earlier attempted to purchase the dye, but respondent was out and more had to be ordered. When the dye came in, the coworker set it aside for claimant, leaving it in the conference room. Claimant testified she planned to take the dye to a cage

area at the front of the store, leave the dye there, and pay for it later. It is undisputed that respondent has a policy that prohibits employees from purchasing items from the store while they are on the clock. It is also undisputed that claimant was on the clock at the time she slipped and fell.

As a general rule, injury during a paid break is considered to arise out of employment because the break is considered to be to the mutual benefit of the worker and employer. *Larson's Workers Compensation Law*, Sec. 21.01 (2000). The Board finds nothing in the claimant's conduct that would except it from this. The parties both focus, in part, on whether claimant was violating company policy against purchasing product while on company time. But there is no claim that claimant was refusing to use a guard or protection under K.S.A. 44-501 and violation of a company policy is not, as a general rule, a defense to a workers compensation claim. The break time is a time the employee is allowed to spend away from the work generally doing something for the employee with the expectation that the break makes the employee's work time more productive. The fact that the claimant was not, at the time of the injury, engaged in the more common break activities does not, in our view, change the operative facts.

The Board concludes claimant's injury arose out of employment. The Board has determined the claim is compensable but there remain non-jurisdictional issues concerning the benefits to be awarded that were not, for obvious reasons, decided by the ALJ. At the time of the hearing, claimant had returned to work and it is not clear what, if any, medical care claimant seeks. The case is, therefore, remanded to the ALJ for determination of what preliminary benefits should be awarded.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Bruce E. Moore should be, and the same is hereby, reversed and remanded.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Scott J. Mann, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director